**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

Criminal Action No. 1:07-cr-00090-WYD

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. B&H MAINTENANCE & CONSTRUCTION, INC., a New Mexico corporation;
2. JON PAUL SMITH a/k/a J.P. SMITH; and
3. LANDON R. MARTIN,

Defendants.

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**UNITED STATES' OBJECTION TO THE PROPOSED EXPERT TESTIMONY OF JENS BROWN AND JIMMY CAVE**

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The United States hereby objects to the testimony of B&H Maintenance & Construction, Inc.'s, J.P. Smith's and Landon Martin's ("Defendants") proposed experts, Jens Brown and Jimmy Cave, because their testimony is not relevant to the issues in this case. "[T]he opportunity to present evidence is not unfettered - a district court's resolution of evidentiary questions is constrained by the twin prongs of relevancy and materiality, and guided by the established rules of evidence and procedure." *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1121 (10th Cir. 2006) *cert. denied*, 127 S. Ct. 420 (2006). It is the proponents' burden to establish the relevance and reliability of their experts' testimony under Federal Rule of Evidence 702 based on a preponderance of evidence standard. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593 n.

10 (1993). Defendants have not met this burden. Furthermore, the proposed expert testimony also creates a significant risk of confusing the issues and misleading the jury. *See* Fed. R. Evid. 403. Consequently, the proposed expert testimony should be excluded under both Federal Rules of Evidence 702 and 403.

## I. INTRODUCTION

On December 3, 2007, pursuant to the Case Management Order in this case (Docket No. 41), Defendants filed their "Defense Endorsement of Expert Witnesses" (Docket No. 144). The Case Management Order calls for the United States to designate rebuttal experts by December 15, 2007.[1] However, based on the limited information provided by Defendants concerning the proposed experts and their testimony, the United States is unable to determine the exact scope of the proposed expert testimony and, therefore, can not, at this time, designate rebuttal witnesses. Nonetheless, based on the limited information Defendants' provided, the United States objects to these proffered experts because any testimony by them would not be relevant to the fact-driven issues in this case, and thus the proposed testimony will not assist the trier of fact to understand the evidence or to determine a fact in issue.[2] *See* Fed. R. Evid. 702. Therefore, the Court should

[1] The Case Management Order required the United States to designate experts by November 1, 2007. The United States did not designate any experts in this case because the issues in this case are purely factual: (1) was there a conspiracy to rig bids; (2) did the Defendants participate in that conspiracy; and (3) interstate commerce.

[2] Due to the lack of information provided by the Defendants about the proposed experts, the United States is unable, at this time, to fully articulate all its objections to the testimony of these experts. However, once the Defendants have produced their expert reports, the United States will be in a position to raise additional, specific objections to the testimony of these proposed experts.

exclude the testimony of Defendants' proposed experts. *Daubert*, 509 U.S. at 591 ("Expert testimony which does not relate to any issue in the case is not relevant . . .") (citations omitted).

Additionally, given Defendants' proposed foray into the general functions of computer software, pipeline industry practices, and the difficulty of installing pipeline materials, the proffered testimony creates a significant risk of confusing the issues and misleading the jury. *See* Fed. R. Evid. 403. Accordingly, the proposed expert testimony should also be excluded under Rule 403.

## II. THE LEGAL FRAMEWORK FOR DETERMINING THE ADMISSIBILITY OF EXPERT WITNESS TESTIMONY: THE COURT'S GATEKEEPER ROLE UNDER *DAUBERT*

The admissibility of expert testimony is governed by Federal Rule of Evidence 702. Rule 702 permits testimony only by experts qualified by "knowledge, skill, expertise, training, or education," to testify "in the form of an opinion or otherwise" based on "scientific, technical, or other specialized knowledge" if that testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. "In evaluating the admissibility of expert testimony, trial courts are guided by a trilogy of Supreme Court cases: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 . . .(1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 . . .(1999); and *General Electric Co. v. Joiner*, 522 U.S. 136 . . . (1997). Together these cases clarify the district court's gatekeeper role under Federal Rule of Evidence 702." *Rodriguez-Felix*, 450 F.3d at 1122.

In *Daubert*, the Supreme Court held that prior to the admission of expert testimony, the

trial court "must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 U.S. at 589. The burden is on the proponent of the expert testimony to establish the admissibility of the testimony under Rule 702 based on a preponderance of the evidence. *See Id.* at 593 n. 10. In *Kumho Tire*, the Supreme Court "conclude[d] that *Daubert's* general holding - setting forth the trial judge's general 'gatekeeping' obligation - applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." *Kumho Tire*, 526 U.S. at 141. Finally, *General Electric* set forth an abuse of discretion standard in reviewing the decision of a district court to exclude or admit expert testimony. *General Electric*, 522 U.S. at 146.

"The objective of the [gatekeeping] requirement is to ensure the reliability and relevancy of expert testimony." *Kumho Tire*, 526 U.S. at 152**.** "The Supreme Court has held that Rule 702 imposes a special obligation upon a trial judge to ensure that ***all*** expert testimony, even non-scientific and experience-based expert testimony, is both relevant and reliable." *United States v. Adams*, 271 F.3d 1236, 1245 (10th Cir. 2001) (citing *Kumho Tire*, 526 U.S. at 147) (emphasis added). Thus, the testimony of an expert, even if found to be reliable under *Daubert*, must be excluded if the proposed testimony is not relevant to an issue in the case.

While the district court is required to exercise the gatekeeper function, it retains broad discretion in deciding how to assess an expert's reliability, including what procedures to utilize in making that assessment, as well as in making the ultimate determination of reliability. *Rodriguez-Felix*, 450 F.3d at 1123 (upholding district court's exclusion of expert testimony that did not meet *Daubert*'s reliability standards) (internal quotations omitted). However, despite this

broad discretion, the Tenth Circuit has held that "a district court, when faced with a party's objection, must adequately demonstrate by specific findings on the record that it has performed its duty as gatekeeper." *Goebel v. Denver & Rio Grande W. R.R. Co.*, 215 F.3d 1083, 1088 (10th Cir. 2000).

## III. DEFENDANTS' PROPOSED EXPERTS SHOULD BE EXCLUDED BECAUSE THEIR TESTIMONY WILL NOT BE RELEVANT TO ISSUES IN THE CASE

Defendants are charged with a conspiracy to rig bids in violation of the Sherman Act, 15 U.S.C. § 1. The relevant issues in this case are: whether a conspiracy to rig bids existed; whether Defendants participated in this conspiracy; and interstate commerce.

On December 3, 2007, Defendants designated two experts to testify at trial: Jens Brown of SMART Business Advisory and Consulting LLC, and Jimmy Cave of Cave Enterprises. *See* Defense Endorsement of Expert Witnesses (Docket No. 144). Based on the limited information provided to date, it does not appear that Defendants' proposed experts can provide testimony relevant to the conspiracy charged in this case.

### A. JENS BROWN

The first witness that the Defendants identified, Jens Brown, is an expert in computer and web-based systems who Defendants may call to testify about Ariba Quick Source and also about "pipeline-industry norms." "Pipeline-industry norms" are not relevant to any issue in this case.[3] Furthermore, based on his resume, Mr. Brown does not appear to have any expertise in "pipeline-

[3] What is at issue is whether bids for pipeline construction projects that were submitted were rigged by Defendants and their coconspirators.

industry norms." Ariba Quick Source is the software program that the victim of this conspiracy, BP America Production Company ("BP America"), used to solicit and receive bids for five of the nine projects rigged by the Defendants and their coconspirators. The other four rigged bids were submitted via U.S. Mail or commercial interstate carrier.[4] Indeed, the United States will call fact witnesses to testify about BP America's receipt of bids via Quick Source. As the Tenth Circuit held in *Rodriguez-Felix*, where the determination of facts in issue is dependent on the reliability of fact witnesses, cross-examination (not expert testimony) is the appropriate tool to test the witnesses' recollections. *See id.*, 450 F.3d at 1126.

**B. JIMMY CAVE**

The second witness the Defendants identified, Jimmy Cave, is an "expert in the identification, use and valuation of pipe used in the building of gas pipeline projects." While the projects rigged by the Defendants and their coconspirators were for construction of gas pipelines, the value of the pipes used in the projects is not relevant to any issue in this case. *See* "United States' Motion in Limine to Exclude Improper Evidence and Arguments Relating to Lack of Effect, Justification, Reasonableness, or Lack of Intent" (Docket No. 82). Likewise the "identification and valuation" of pipe used to construct roping arenas, fences or other fixtures; whether it was more difficult or more costly to use pipeline construction pipe as opposed to standard construction pipe; and the *likelihood that* the pipe came from pipeline construction companies is not relevant to any issue in this case.

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[4] B&H won five of the nine projects for a total value of $2,217,848. Flint, B&H's coconspirator, won four projects for a total value of $672,036.

## IV. DETERMINATION OF THE ADMISSIBILITY OF DEFENDANTS' PROPOSED EXPERT TESTIMONY

To date, Defendants have not proffered sufficient information to meet their burden to show admissibility of their experts' opinions. Furthermore, this testimony will not be helpful to the trier of fact and will only serve to confuse the issues and mislead the jury. Consequently, it is the United States' position that this proffered testimony should be excluded under Rule 702 and Rule 403.

The United States recognizes, however, that the Court may decide that it needs additional information to perform its *Daubert* "gatekeeper" function and make "specific findings on the record" regarding the admissibility of expert testimony. *Goebel*, 215 F.3d at 1088. Therefore, the United States respectfully requests that, if that is the case, the Court hold a *Daubert* hearing thirty days prior to the scheduled trial date to determine the admissibility of Defendants' proposed expert testimony. Furthermore, to enable the United States to fully prepare for that hearing, the United States requests that the Court order Defendants to provide expert reports, similar to the reports required in Federal Rule of Civil Procedure 26(a)(2)(B), for each of their proposed experts sixty days prior to the *Daubert* hearing.

## V. REQUEST FOR EXTENSION OF TIME TO DESIGNATE REBUTTAL EXPERTS

Finally, pursuant to the Case Management Order, the United States' designation of rebuttal experts is due on December 15, 2007. Given the lack of specificity (the lack of information concerning the proposed experts qualifications, their proposed testimony and the basis of that testimony) in the Defendants' disclosures, these disclosures provide little guidance to

the United States as to what opinions the United States will need experts to rebut. Therefore, the United States is unable to designate rebuttal experts at this time. Accordingly, the United States requests permission to designate rebuttal experts, if any, thirty days after Defendants produce their expert reports.

## VI. CONCLUSION

For the foregoing reasons, Defendants have failed to satisfy their burden for offering expert testimony under Rule 702 according to the standards articulated in *Daubert* and its progeny. Furthermore, the testimony should be excluded under Rule 403 because it will confuse the issues and mislead the jury. Accordingly, the United States respectfully requests that the Court exclude the expert testimony of Jens Brown and Jimmy Cave.

In the alternative, in the event the Court determines that there is not an adequate record to make this determination, the nited States respectfully requests that the Court order a *Daubert* evidentiary hearing thirty days prior to the scheduled date of the trial in this case and to further order that the Defendants produce their expert reports at least sixty days prior to the *Daubert* hearing. Finally, the United States requests permission to designate rebuttal experts thirty days after Defendants produce their expert reports.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

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I hereby certify that on December 14, 2007, I electronically filed the foregoing "United States' Objection to the Proposed Expert Testimony of Jens Brown and Jimmy Cave" using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participants in the manner indicated by the non-participant's name:

None.

Respectfully Submitted,

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